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Attorneys for Plaintiff

12
13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**
15

16 **THERMOLIFE INTERNATIONAL, LLC**

17 Plaintiff,

18 vs.

19 **KILOSPO RTS, INC.,**

20 Defendant.
21
22

Case No. '13CV2170 MMANLS

**COMPLAINT FOR PATENT
INFRINGEMENT**

JURY TRIAL DEMANDED

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1 Plaintiff Thermolife International, LLC ("Plaintiff") hereby alleges for its
 2 Complaint against KiloSports, Inc. ("Defendant"), on personal knowledge as to its
 3 own activities and on information and belief as to the activities of others, as
 4 follows:

5 I. THE PARTIES

6 1. Plaintiff is a limited liability company organized and existing under
 7 the laws of Arizona, with a place of business at 1811 Ocean Front Walk in Venice,
 8 California, 90291.

9 2. Plaintiff is and was at all relevant times the exclusive licensee of
 10 United States Patent No. 6,117,872, titled "Enhancement of Exercise Performance
 11 by Augmenting Endogenous Nitric Oxide Production or Activity," referred to
 12 herein as the "patent in suit."

13 3. The above patent is and was owned by The Board of Trustees of the
 14 Leland Stanford Junior University ("Stanford University") and Plaintiff exclusively
 15 licenses and licensed at all relevant times the patent from Stanford University.

16 4. Plaintiff has been given the right by Stanford University to institute
 17 suit with respect to infringements of the patent in suit, including this suit against
 18 Defendant.

19 5. Defendant is a corporation organized and existing under the laws of
 20 Arizona with a principal place of business at 1324 E. Desert Willow Dr. in Phoenix,
 21 Arizona, 85048.

22 II. JURISDICTION AND VENUE

23 6. This is an action for patent infringement arising under the patent laws
 24 of the United States, Title 35 of the United States Code. Accordingly, this Court has
 25 subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338, and 1367.

26 7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and
 27 1400.

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1 8. This Court has personal jurisdiction over Defendant. By way of
2 example and without limitation, Defendant, directly or through intermediaries
3 (including distributors, retailers, and others), makes, manufactures, ships,
4 distributes, advertises, markets, offers for sale, and/or sells dietary supplement
5 products that infringe on one or more claims of the patent in suit (hereinafter the
6 “accused products”), which include without limitation products sold under the
7 “Technical Knockout” brand name, in the United States, the State of California, and
8 the Southern District of California.

9 9. By way of further example and without limitation, Defendant has
10 purposefully and voluntarily placed the accused products into the stream of
11 commerce with the expectation that they will be purchased in the Southern District
12 of California, and the products are actually purchased in the Southern District of
13 California.

14 **III. THE DEFENDANT’S INFRINGEMENTS**

15 10. Defendant has committed the tort of patent infringement within the
16 State of California, and more particularly, within the Southern District of
17 California, by virtue of the fact that Defendant has formulated, made,
18 manufactured, shipped, distributed, advertised, offered for sale, and/or sold the
19 accused products in this District, and continues to do so.

20 **A. DIRECT INFRINGEMENTS**

21 11. Defendant’s employees, agents, representatives and other persons
22 sponsored by or who endorse Defendant and Defendant’s products in advertising
23 and marketing activities, have taken, used, and orally administered the accused
24 products.

25 12. The accused products are formulated, made, manufactured, shipped,
26 distributed, advertised, offered for sale, and sold by Defendant to include certain
27 ingredients that, by virtue of their inclusion in the products, infringe one or more
28 claims of one or more of the patent in suit.

1 13. The accused products are formulated, made, manufactured, shipped,
2 distributed, advertised, offered for sale, and sold by Defendant to include specific
3 ingredients for certain purposes that, by virtue of their inclusion in the products for
4 such purposes, infringe one or more claims of the patent in suit, and as a result,
5 when Defendant's employees, agents, representatives and other persons sponsored
6 by or who endorse Defendant and Defendant's products in advertising and
7 marketing activities orally administer the accused products, they are practicing and
8 they practiced the methods disclosed in those claims.

9 14. The purposes for which these ingredients are included in the accused
10 products are and were, without limitation, to enhance nitric oxide production, to
11 improve nitric oxide activity, to produce nitric oxide, to boost nitric oxide levels in
12 the body, and to enhance physical performance.

13 15. Defendant encouraged and/or is aware of the fact that its employees,
14 agents, representatives and other persons sponsored by Defendant or who endorse
15 Defendant and Defendant's products in advertising and marketing activities orally
16 administered and administer the accused products and practice and practiced the
17 methods disclosed in one or more claims of the patent in suit, and these employees,
18 agents, representatives and other persons sponsored by Defendant or who endorse
19 Defendant and Defendant's products in advertising and marketing activities are and
20 were acting under Defendant's direction and control when practicing those
21 methods.

22 16. Therefore, Defendant is and was a direct infringer of one or more
23 claims of the patent in suit, and Defendant practices and practiced the methods as
24 set forth in one or more claims of the patent in suit.

25 **B. INDIRECT INFRINGEMENTS**

26 17. End-users of Defendant's accused products were and are also direct
27 infringers of one or more claims of the patent in suit.

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1 18. End-users of Defendant's accused products have taken, used, and
2 orally administered the accused products.

3 19. The accused products are and were formulated, made, manufactured,
4 shipped, distributed, advertised, offered for sale, and/or sold by Defendant to
5 include certain ingredients that, by virtue of their inclusion in the products, infringe
6 and infringed one or more claims of the patent in suit.

7 20. The accused products are and were formulated, made, manufactured,
8 shipped, distributed, advertised, offered for sale, and/or sold by Defendant to
9 include specific ingredients for certain purposes that, because of their inclusion in
10 the products for such purposes, infringe and infringed one or more claims of the
11 patent in suit, and as a result, when end-users of Defendant's accused products
12 orally administer and administered the accused products, they are and were
13 practicing the methods disclosed in those claims.

14 21. Defendant's labels and advertising for the accused products explain
15 and explained the elements and essential elements of one or more of the methods
16 disclosed in the patent in suit, and those labels and advertising statements
17 encourage, urge, and induce the accused products' end-users, and did so in the past,
18 to purchase and orally ingest the products to practice those methods, and end-users
19 do and did practice those methods.

20 22. Defendant has therefore specifically intended to cause these end-users
21 to directly infringe the claimed methods of this patent, and in fact urged them to do
22 so.

23 23. The accused products are and were not suitable for non-infringing
24 uses, and none of Defendant's labels or advertisements for the accused products
25 disclose or disclosed any uses for the products, nor for the compounds disclosed in
26 the claimed methods of the patent in suit, that do not infringe upon such methods.

27 24. The inclusion of the specific infringing compounds in the products is
28 and was material to practicing such methods.

1 25. Defendant has and had knowledge that the accused products are and
2 were especially adapted by end-users of the products for the practicing of such
3 methods, and, indeed, Defendant encourages, urges, and induces the accused
4 products' end-users to purchase and orally administer the accused products to
5 practice such methods, and has done so in the past.

6 26. Defendant intentionally and knowingly induced, encouraged, and
7 urged end-users of the accused products to purchase and orally administer the
8 accused products for the purposes of practicing the claimed methods, by having
9 them orally ingest the compounds disclosed in such claims.

10 27. Defendant has and had knowledge of the fact that the accused
11 products, particularly as administered, infringe on one or more claims of the patent
12 in suit.

13 28. Defendant has and had direct, firsthand knowledge of the patent in
14 suit.

15 29. For example and without limitation, Plaintiff believes Defendant has
16 had knowledge of the patent in suit since November 2006, when an ongoing
17 settlement of a patent infringement case relating to the patent suit and other related
18 patents against Herbalife, a well-known company in Defendant's industry, was
19 announced in press releases issued in a highly publicized manner. Plaintiff believes
20 Defendant's employees, agents, and representatives saw the press releases and were
21 aware of the settlement and thus the patent in suit.

22 30. By way of further example and without limitation, Defendant sold its
23 products through retailers, including online retailers, and those retailers have sold
24 other companies' products whose labels and/or advertisements have been
25 prominently marked with the patent in suit and/or related patents, by patent number,
26 including without limitation, upon information and belief, the products
27 manufactured and sold by Herbalife, Daily Wellness, and Vitality Research Labs.
28 Defendant's employees, agents, and representatives have seen these labels and

1 advertisements and, thus, Defendant has and had direct knowledge of the patent in
2 suit.

3 31. Defendant brazenly and willfully decided to infringe the patent in suit
4 despite knowledge of the patent's existence and its knowledge of the accused
5 products' infringements of the patent.

6 32. At a minimum, and in the alternative, Plaintiff pleads that Defendant
7 willfully blinded itself to the infringing nature of the accused products' sales.

8 33. Defendant did not cease its own direct infringement, nor its
9 contributory infringement or inducement of infringement by end-users, despite its
10 knowledge of the patent in suit and the end-users' infringing activities with respect
11 to the patent in suit.

12 **IV. FIRST CAUSE OF ACTION**

13 **Infringement of U.S. Patent No. 6,117,872**

14 34. Plaintiff repeats and re-alleges the allegations of the foregoing
15 paragraphs of this Complaint as if fully set forth herein.

16 35. Defendant has in the past and still is literally and directly infringing or
17 directly infringing under the doctrine of equivalents one or more claims of United
18 States Patent No. 6,117,872 by making, using, selling, and offering for sale the
19 accused products, or any one of those products, and will continue to do so unless
20 enjoined by this Court.

21 36. In addition to the fact that Defendant makes, uses, sells, and offers for
22 sale the accused products, further examples of Defendant's direct infringements
23 include, without limitation, the fact that Defendant has encouraged and/or is aware
24 of the fact that its employees, agents, representatives and other persons sponsored
25 by or who endorse Defendant and Defendant's products in advertising and
26 marketing activities orally administer the accused products and practice the
27 methods disclosed in one or more claims of United States Patent No. 6,117,872,
28 and these employees, agents, representatives and other persons sponsored by or

1 who endorse Defendant and Defendant's products in advertising and marketing
2 activities are acting under Defendant's direction and control when practicing those
3 methods.

4 37. Defendant has encouraged and is aware of these persons' oral
5 administration of the accused products for these purposes, these persons are acting
6 under Defendant's direction and control, and therefore Defendant is directly
7 practicing the methods disclosed in United States Patent No. 6,117,872.

8 38. End-users of Defendant's accused products are also direct infringers of
9 one or more claims of United States Patent No. 6,117,872.

10 39. End-users of Defendant's accused products have taken, used, and
11 orally administered the accused products.

12 40. The accused products are formulated, made, manufactured, shipped,
13 distributed, advertised, offered for sale, and sold by Defendant to include certain
14 ingredients that, by virtue of their inclusion in the products, infringe one or more
15 claims of United States Patent No. 6,117,872.

16 41. The accused products is formulated, made, manufactured, shipped,
17 distributed, advertised, offered for sale, and sold by Defendant to include specific
18 ingredients for purposes that, by their inclusion in the products for such purposes,
19 infringe one or more claims of United States Patent No. 6,117,872, and as a result,
20 when end-users of Defendant's accused products orally administer the accused
21 products, they are practicing the methods disclosed in one or more claims of that
22 patent.

23 42. Defendant's labels and advertising for the accused products explain the
24 elements and essential elements of the methods disclosed in United States Patent
25 No. 6,117,872, and those labels and advertising statements encourage, urge, and
26 induce the accused products' end-users to purchase and orally ingest the products to
27 practice those methods, and end-users do practice those methods.

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1 43. Defendant has therefore specifically intended to cause these end-users
2 to directly infringe the claimed methods of United States Patent No. 6,117,872, and
3 has in fact urged them to do so.

4 44. The accused products are not suitable for non-infringing uses, and
5 none of Defendant's labels or advertisements for the accused products disclose any
6 uses for the products, nor for the compounds disclosed in the claimed methods, that
7 do not infringe upon such methods.

8 45. The inclusion of these specific infringing compounds in the products is
9 material to practicing such methods.

10 46. Defendant has knowledge that the accused products are especially
11 adapted by end-users of the products for the practicing of such methods, and,
12 indeed, Defendant encourages, urges, and induces the accused products' end-users
13 to purchase and orally administer the accused products to practice such methods,
14 and have done so in the past.

15 47. Defendant has intentionally and knowingly induced, encouraged, and
16 urged end-users of the accused products to purchase and orally administer the
17 accused products for the purposes disclosed in one or more claims of United States
18 Patent No. 6,117,872, by having them orally ingest the compounds disclosed in
19 such claims.

20 48. Defendant has knowledge of the fact that the accused products,
21 particularly as administered, infringe on one or more claims of United States Patent
22 No. 6,117,872.

23 49. Defendant also has direct, firsthand knowledge of United States Patent
24 No. 6,117,872.

25 50. Defendant's activities have been without express or implied license by
26 Plaintiff.

27 51. As a result of Defendant's acts of infringement, Plaintiff has suffered
28 and will continue to suffer damages in an amount to be proved at trial.

52. As a result of Defendant's acts of infringement, Plaintiff has been and will continue to be irreparably harmed by Defendant's infringements, which will continue unless Defendant is enjoined by this Court.

53. Defendant's past infringements and/or continuing infringements have been deliberate and willful, and this case is therefore an exceptional case, which warrants an award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of judgment against Defendant as follows:

1. A declaration that Defendant has infringed the patent in suit, under 35 U.S.C. §§ 271 *et seq.*;

2. That injunctions, preliminary and permanent, be issued by this Court restraining Defendant, its officers, agents, servants, directors, and employees, and all persons in active concert or participation with each, from directly or indirectly infringing, or inducing or contributing to the infringement by others of, the patent in suit;

3. That Defendant be required to provide to Plaintiff an accounting of all gains, profits, and advantages derived by Defendant's infringement of the patent in suit, and that Plaintiff be awarded damages adequate to compensate Plaintiff for the wrongful infringing acts by Defendant, in accordance with 35 U.S.C. § 284;

4. That the damages awarded to Plaintiff with regard to the patent in suit be increased up to three times, in view of Defendant's willful infringement, in accordance with 35 U.S.C. § 284;

5. That this case be declared to be exceptional in favor of Plaintiff under 35 U.S.C. § 285, and that Plaintiff be awarded its reasonable attorneys' fees and other expenses incurred in connection with this action;

6. That Plaintiff be awarded its interest and costs of suit incurred in this

1 action;

2 7. Compensatory damages;

3 8. Punitive damages; and

4 9. That Plaintiff be awarded such other and further relief as this Court
5 may deem just and proper.

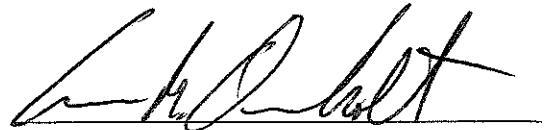
6 **DEMAND FOR JURY TRIAL**

7 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a
8 jury trial for all issues in this case that properly are subject to a jury trial.

9
10 DATED: September 12, 2013

HIDEN, ROTT & OERTLE, LLP

11
12 By:



Eric M. Overholt, Esq.

Attorneys for Plaintiff

HIDEN, ROTT & OERTLE, LLP

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

THERMOLIFE INTERNATIONAL LLC

(b) County of Residence of First Listed Plaintiff Los Angeles County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

SEE ATTACHMENT

DEFENDANTS

KILOSORTS, INC.

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

'13CV2170 MMANLS**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY: <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property/21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input checked="" type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ref. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 USC SECTION 1331, 1338, 1367; 15:1126

Brief description of cause:
Patent Litigation

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Hon. Janis L. SammartinoDOCKET NUMBER 13-CV-651

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

ATTACHMENT TO CIVIL COVER SHEET

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